Office - Supreme Court, U.S.
FILED
MAR 23 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-984

In the Supreme Court of the United States

OCTOBER TERM, 1983

V.N.A. OF GREATER TIFT COUNTY, INC., PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

FTC v. *Dean Foods Co.*, 384 U.S. 597 ..... 5, 6

Sampson v. *Murray*, 415 U.S. 61 ..... 5, 6

United States v. *New York Telephone Co.*, 434 U.S. 159 ..... 5, 6

Weinberger v. *Salfi*, 422 U.S. 749 ..... 3, 5

Statutes and regulations:

All Writs Act, 28 U.S.C. 1651 5

28 U.S.C. 1651(a) 4

42 U.S.C. 405(h) 3, 5

42 U.S.C. (& Supp. V) 1395 *et seq.* 1

42 U.S.C. (Supp. V) 1395f(b) 1

42 U.S.C. (& Supp. V) 1395g 2

42 U.S.C. 1395g(a) 2

42 U.S.C. (& Supp. V) 1395h 2

42 U.S.C. 1395x(v)(1)(A) 1, 2

42 U.S.C. 1395hh 2

42 U.S.C. 1395ii 3

42 U.S.C. (& Supp. V) 1395*oo* 2

Page

Statutes and regulations—Continued:

42 C.F.R. Pt. 405:

Section 405.370 2
Section 405.405 2
Section 405.427 ..... 2, 3
Section 405.427(b) 2
Section 405.427(c)(2) 2
Section 405.453(a) 2
Section 405.454 2
Section 405.1803(b) 2-3
Section 405.1835 2

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-984

V.N.A. OF GREATER TIFT COUNTY, INC., PETITIONER

v.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner, a nonprofit provider of home health care services under Part A of the Medicare program, 42 U.S.C. (& Supp. V) 1395 *et seq.*, challenges the decisions of the courts below denying injunctive relief against recoupment of an alleged overpayment pending final administrative review.

1. a. Under the Medicare statute, providers of medical services receive reimbursement for the "reasonable cost of any services" rendered to Medicare beneficiaries, defined as "the cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services." 42 U.S.C. 1395x(v)(1)(A). See also 42 U.S.C. (Supp. V) 1395f(b). Congress has given the Secretary of Health and Human Services express statutory authority to establish the methods for determining

"reasonable costs" for services and to prescribe regulations necessary to administer the Medicare program. See 42 U.S.C. 1395x(v)(1)(A), and 1395hh.

Pursuant to this statutory authority, the Secretary has promulgated 42 C.F.R. 405.427, which states that a provider that obtains services, facilities, or supplies from a related organization will be reimbursed only for the cost to the supplying organization or the market price, whichever is lower. Two organizations are "related" when they are "to a significant extent * * * associated or affiliated," when one owns or controls the other, or when they are commonly owned or controlled. (42 C.F.R. 405.427(b)). The related organizations rule applies even when the provider and the related organization are separate legal entities. (42 C.F.R. 405.427(c)(2)).

The Secretary reimburses Medicare providers through "fiscal intermediaries," which initially determine the amount of reimbursement a provider is entitled to receive. (42 U.S.C. (& Supp. V) 1395g, and 1395h). Providers generally are reimbursed monthly on the basis of interim rates, which are later adjusted on the basis of the provider's quarterly and annual cost reports. (42 U.S.C. 1395g(a); 42 C.F.R. 405.405, 405.453(a), and 405.454). If an intermediary concludes that a provider has been overpaid and that suspension of payments is needed to protect the Medicare program against financial loss, it may suspend payments to that provider in whole or in part pursuant to procedures set out in the regulations. (42 C.F.R. 405.370).

A provider that wishes to contest an intermediary's reimbursement determination may appeal to the Provider Reimbursement Review Board (PRRB) if the amount in controversy is $10,000 or more. (42 U.S.C. (& Supp. V) 1395*oo*; 42 C.F.R. 405.1835). The PRRB lacks authority to stay an intermediary's suspension of payments to a provider while a dispute is pending before the PRRB. See 42 C.F.R.

405.1803(b). Under 42 U.S.C. 1395ii (incorporating by reference 42 U.S.C. 405(h)), the courts lack jurisdiction to review an intermediary's reimbursement determination before the PRRB renders its decision.

b. In 1982, petitioner's fiscal intermediary, respondent Blue Cross and Blue Shield of Georgia/Columbus, Inc. (Blue Cross), determined that petitioner had received overpayments in the amount of $31,637, representing reimbursement for certain amounts petitioner had paid in 1980 to Health Care International, Inc. (HCI), pursuant to a management contract. Blue Cross took the position that in 1980 petitioner and HCI had been related organizations within the meaning of 42 C.F.R. 405.427.[1] Blue Cross informed petitioner that it intended to begin recovering the overpayments immediately, but offered to negotiate a plan that would minimize the burden of recoupment. Pet. App. A30.

Petitioner did not accept Blue Cross's offer to work out a plan for recovery of the overpayments. (Pet. App. A30). Instead, petitioner brought this action in the United States District Court for the Middle District of Georgia seeking a preliminary injunction against any collection efforts pending the disposition of petitioner's appeal to the PRRB. Petitioner alleged that the result of immediate recoupment would be to force it out of business. Following a hearing, the district court denied petitioner's motion for a preliminary injunction and dismissed the complaint. Relying on *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), the court concluded that it lacked subject matter jurisdiction because the PRRB had not yet rendered a decision. Pet. App. A40-A41.

---

[1] Blue Cross concluded that HCI had "effective control" over V.N.A. based on, inter alia, the fact that HCI had started up and capitalized V.N.A. and had recruited its board of directors, that the head administrator of V.N.A. was an HCI employee, and that HCI had sole control over all personnel actions and custody of V.N.A.'s financial and statistical records. (Pet. App. A8-A9).

The court of appeals affirmed, one judge dissenting (Pet. App. A1-A37). The court of appeals concluded that, while the Medicare statute standing alone would preclude exercise of jurisdiction, the district court had the power to issue an injunction under the All Writs Act, 28 U.S.C. 1651(a), in certain extraordinary circumstances (Pet. App. A10-A30).[2] However, the court of appeals concluded that petitioner had not shown the existence of such circumstances in this case. While the court acknowledged that there would be irreparable harm if a provider were forced out of business as the result of recoupment, it noted that the significance of this injury was lessened by the facts that the provider could negotiate an agreement that would make suspension of payments as painless as possible, that the problem of bankruptcy is endemic to a system that depends on nonprofit providers that are wholly dependent on Medicare reimbursement, and that providers have notice of the risk that an intermediary's determination may delay payment. (*id.* at A30-A31). The court of appeals also concluded that petitioner's probability of success on the merits was "by no means overwhelming" and that the intermediary's determination was not obviously wrong or beyond its authority (*id.* at A31).

2. The court of appeals correctly affirmed the denial of injunctive relief. Its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

---

[2]The All Writs Act, 28 U.S.C. 1651(a), provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

a. In *Weinberger* v. *Salfi*, 422 U.S. 749 (1975), this Court concluded that the limitation of jurisdiction in 42 U.S.C. 405(h) must be strictly observed. Petitioner correctly notes that the scope of that limitation is the subject of a conflict among the circuits.[3] But petitioner is not in a position to press that issue, because it is not aggrieved by the court of appeals' holding with respect to the Section 405(h) limitation. Although the court of appeals concluded that Section 405(h), standing alone, would preclude the district court from exercising jurisdiction, it went on to hold that the district court had authority to proceed under the All Writs Act, 28 U.S.C. 1651. Since the court of appeals did not hold that Section 405(h) barred injunctive relief here, this case does not raise any issue on which there is a conflict.

b. If we assume arguendo that the district court could have proceeded under the All Writs Act, the court of appeals correctly concluded that injunctive relief was inappropriate because petitioner had not shown either irreparable injury or a sufficient probability of success on the merits.

Petitioner contends that the court of appeals relied too heavily on this Court's opinion in *Sampson* v. *Murray*, 415 U.S. 61 (1974), in particular the statements there (*id.* at 77-78 & nn. 34, 36) that injunctive relief is available under the All Writs Act only if an appellate court's jurisdiction otherwise would be "defeated." Petitioner suggests (Pet. 9) that *Murray* was an aberration and that in *United States* v. *New York Telephone Co.*, 434 U.S. 159 (1977), the Court returned to the standard articulated in *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 604 (1966), under which injunctive relief should be afforded when necessary to avoid "impairing or

---

[3]One case that raises the issue of the scope of Section 405(h) is currently before the Court. *Heckler* v. *Ringer*, No. 82-1772 (argued Feb. 27, 1984).

frustrating" an appellate court's jurisdiction. (434 U.S. at 173). As the court of appeals recognized (Pet. App. A20), however, it was only in *Murray* that the Court was required to reconcile the *Dean Foods* doctrine with a statutory scheme and case precedents that (as in this case) appeared to preclude equitable intervention. See 415 U.S. at 71. Thus, if preliminary injunctive relief is available at all in this case, it presumably is governed by the standard articulated in *Murray*.[4]

Petitioner objects (Pet. 6, 11) that the court of appeals' application of the "heightened standards" requirement of *Murray* will mean that the parties must engage in extensive discovery. But here the court of appeals was able to weigh petitioner's claim for relief based on undisputed facts that were before the district court (Pet. App. A30-A32). Petitioner further suggests (Pet. 11) that the "heightened standards" requirement will fail to provide a remedy for arbitrary bureaucratic action. There is no reason to believe, however, that the normal channels of administrative and judicial review would not be sufficient to correct any such arbitrary action. Indeed, the court of appeals specifically indicated that an injunction might be issued in the case of "outrageous or entirely unauthorized" agency action (of which it found no evidence in this case) (Pet. App. A30). Finally, petitioner urges (Pet. 12-13) that this Court should require it merely to show that it has exhausted all administrative means of avoiding irreparable harm. But petitioner declined in this case to take advantage of the opportunity to negotiate a plan that would minimize the burden of recoupment. See

---

[4]Petitioner's reliance on dicta in *New York Telephone* is misplaced. The portion of the *New York Telephone* opinion quoted in the petition (at 9) is merely a description of the *Dean Foods* holding. The Court's holding in *New York Telephone* related only to a court's authority to issue a writ requiring installation of a pen register.

Pet. App. A30. Thus, it is unlikely that petitioner could meet the very standard it proposes. In any event, the court of appeals correctly concluded (*id.* at A30-A31) that, in the circumstances of this case, petitioner failed to demonstrate that recoupment would cause serious irreparable injury.[5]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MARCH 1984

---

[5]Recoupment from petitioner has proceeded in installments during the course of the litigation. The PRRB has not yet rendered its final decision in this matter.

Petitioner suggests (Pet. 5) that the issues in this case are "significantly related" to those presented by *Heckler* v. *Community Health Services of Crawford County, Inc.*, No. 83-56 (argued Feb. 27, 1984). But *Community Health Services* presents no question concerning injunctive relief, since the parties in that case stipulated that no recoupment would occur pending review of the disallowances in dispute. The question of equitable estoppel raised in *Community Health Services* has no bearing on the questions relating to injunctive relief raised by the petition in this case.

DOJ-1984-03